

**UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD**

**DUKE UNIVERSITY,**

**Employer,**

**and**

**WASHINGTON-BALTIMORE NEWS  
GUILD, LOCAL 32035,**

**Petitioner.**

**Case No. 10-RC-276475**

**WASHINGTON-BALTIMORE NEWS GUILD'S  
OPPOSITION TO REQUEST FOR REVIEW**

On the eve of the Regional Director's decision to open and count the challenged ballot of Christopher Drew Sisk, and anticipating that it may have lost the union election, Duke University ("Employer" or "Duke") takes the extraordinary step of asking the National Labor Relations Board to review the Regional Director's December 14, 2021, "Decision on Challenged Ballots." In so doing, Duke completely ignores the fundamental admonition that a review of a Regional Director's decision under these circumstances may only be granted if there are compelling circumstances, a requirement fully at odds with the facts and law that support the Regional Director's decision in this case. For the reasons that follow, the Washington-Baltimore News Guild, Local 32035 (hereinafter "Union" or "Guild"), the Petitioner herein, urges the Board to deny the Request for Review.

## STATEMENT OF THE CASE

On May 3, 2021, the Guild filed an RC petition with Region 10 seeking to be certified as the collective bargaining representative of a unit of employees of the Duke University Press. Thereafter, the parties entered into a Stipulated Election Agreement for a mixed manual/mail ballot election. On June 29, 2021, the Region conducted a count of the ballots and issued a tally certifying that a majority of the employees had designated the Guild as their bargaining agent, although there were eight (8) challenged ballots which would determine the final results of the election.<sup>1</sup> Thereafter, Duke filed objections to conduct affecting the results of the election. A hearing was held on the challenges and objections on August 10 and 19, 2021, before Hearing Officer Matthew Ritzman of Region 7.<sup>2</sup>

On October 1, 2021, Hearing Officer Ritzman issued his Report and Recommendations on Determinative Challenged Ballots and Objections, and the Regional Director issued his Decision on December 14, 2021. With regard to the challenges, the Regional Director concluded, based on long-standing Board precedent, that the resignation of Kristen Twardowski had no legal effect on her eligibility to vote, and that Drew Sisk also was eligible to vote, despite the Employer's belated claim of temporary status, since he was clearly eligible on the eligibility date for the election. The Regional Director ordered that the ballots of Twardowski, Drew and Michael Cornett be comingled, opened and counted on Wednesday, January 5, 2022. The Employer's Request for Review is confined to its renewed challenge to Sisk's eligibility.

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<sup>1</sup> The preliminary tally shows that of 77 eligible voters, 35 had voted for the Guild and 31 voted against the Guild, with 8 challenged ballots. JX 4. Five of the eight challenges were later withdrawn by the parties. Of the remaining three challenges, the Regional Director affirmed the Hearing Officer's recommendation to reject the Employer's challenge to the ballots of Kristen Twardowski and Drew Sisk, and to deny the Guild's challenge to the ballot of Michael Cornett.

<sup>2</sup> By Order dated July 21, 2021, the case was transferred to Region 7. Board Ex. 1(b).

With regard to the Request for Review, the factual record and settled Board law manifestly support the reasoned decision of the Regional Director. At the hearing, there were few disputes regarding the facts of Sisk's employment. Drew Sisk began his employment with Duke on January 15, 2019, as a book designer and on a full-time basis. By July 2020, Sisk had relocated to Tennessee to take a teaching position at Tennessee Tech University. As a result, Sisk proposed to his immediate supervisor and design manager Amy Buchanan, and to her supervisor Nancy Hoagland, that he convert to part-time status through the end of 2020. Er. Ex. 13; Tr. 263, 319. The Employer agreed, and Sisk reduced his 40 hour per week work schedule to a regular 10 hour per week schedule. Tr. 263. Sisk committed to "work[ing] out the details of [his] transition [to part-time] with you both...." Er. Ex. 13.

A few months later, as the end of the calendar year was approaching, Sisk and Buchanan revisited his status and the Employer agreed he would continue his part-time job at least through June 30, 2021. In a November 12, 2020, email to Sisk, Buchanan informed him that he had been approved to continue his employment through the end of the fiscal year, June 30, 2021, but she expressly left the door open to a further continuation. Buchanan, Sisk's "direct supervisor," Tr. 264, put it simply: "And if this hiring freeze drags on, as I expect it will, maybe longer, if you remain interested." Pet. Ex. 11; Tr. 264.<sup>3</sup> Sisk understood his status: "And then at that point in November when it was like hey, you know, we can extend you to June 30<sup>th</sup>, and possibly further,

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<sup>3</sup> At the hearing, HR manager Bonnie Conner sponsored several email exchanges generated in this time frame to describe the agreement regarding Sisk's work status. Er. Ex. 14, 15; Tr. 248-50. In her testimony, Conner labeled Sisk a "temporary" employee, but she conceded on cross-examination that there was no reference to any "temporary" status in any of the email correspondence. Tr. 248, 253-54. Indeed, Sisk confirmed that no one had ever referred to his position as "temporary." Tr. 267. The Press' formal "Employee Data Sheet," admitted into the record as Petitioner's Ex. 13, also makes no reference to any "temporary" status. Instead, it lists a "planned wks/yr" of 52."

you know. I knew that I could balance it, so it seemed to me that the door was open with the understanding that officially it was approved through June 30<sup>th</sup>, but with that door open, yeah."

Tr. 274. As the Regional Director concluded, Sisk's status was, as of the critical eligibility date, "not sufficiently finite to dispel reasonable contemplation of it continuing beyond June 30, 2021." Decision, pp. 4-5.

When June 2021 rolled around, Buchanan inquired of Sisk as to whether he would be interested in continuing his employment past June 30, 2021. He responded that he was "open to it." Tr. 265. But by about mid-June 2021, Buchanan informed him that the Employer had decided not to continue his employment after June 30, 2021.<sup>4</sup> As a result, Buchanan solicited Sisk to write a resignation letter, and he did so on June 28, 2021. Pet. Ex. 12; Tr. 266, 276. Sisk penned a "goodbye" note to his colleagues on June 30, 2021, his last day as a Duke employee. Er. Ex. 16.<sup>5</sup>

As to the Request for Review, it is hornbook Board law that to be eligible to vote in an NLRB election an employee must be in the unit on the eligibility date and working in employee status on the election date. *Nichols House Nursing Home*, 332 NLRB 1428, 1429 (2000); *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973); *Plymouth Towing Co.*, 178 NLRB 651 (1969). Indeed, changes in employee status that transpire *after* the election date are of no moment.

The Board has frequently held that:

the eligibility of voters in Board elections is to be determined on the basis of employment status of each voter during the eligibility period and at the time of the

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<sup>4</sup> Conner agreed that Buchanan had inquired about Sisk remaining on board after June 30, 2021. Conner testified that by that point Buchanan "had already submitted the termination request," the Employer had hired his replacement, and, thus, they could not retain Sisk. Tr. 319.

<sup>5</sup> The Regional Director affirmed the Hearing Officer's finding that Sisk performed unit work on a regular basis as a regular part-time employee, thus sharing a community of interest with the employees in the unit. Decision, n. 7.



election. *Accordingly, any change in employment status subsequent to the election is immaterial with regard to eligibility in an election.*

*North General Hospital*, 314 NLRB 14, 15 (1994) (emphasis in original). Thus, an employee who is set to become a supervisor *after* the election is still eligible because they were eligible on the date of the election. *Nichols House Nursing Home*, 332 NLRB 1428 (2000); *Grange Debris Box & Wrecking Co.*, 344 NLRB 1004 (2005) (employee was eligible who had given notice but was employed on the election date). Similarly, an individual who is an eligible employee on the date of the election is entitled to have their ballot counted even if that employee intends to quit after the election. *Magic Beans, LLC*, 352 NLRB 872 (2008)<sup>6</sup>; *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1444 (9<sup>th</sup> Cir. 1093).<sup>7</sup>

As found by the Regional Director, Sisk was, by all accounts, a regular part-time employee on the date of the election, and his employment did not conclude until the end of the June 30, 2021, workday.<sup>8</sup> As he was an employee in the unit on the day the ballots were counted, his, too, should have been counted.

Duke seeks to dodge this conclusion by concocting an argument that Sisk was a temporary employee at the time of the election. The Board has long held that the test for an individual who has been classified as a temporary employee is whether their tenure is uncertain.

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<sup>6</sup> There, the Board cited *Personal Products Corp.*, 114 NLRB 959, 961 (1955), for the proposition that an employee who gave notice to the employer that she would quit two days after the election was eligible to vote.

<sup>7</sup> *Cf. Dakota Fire Protection, Inc.*, 337 NLRB 92 (2001) (employee not eligible who terminated employment and stopped working before the election).

<sup>8</sup> The standard for determining whether a part-time employee is eligible to vote in an election is if the employee averages four or more hours a week for the last quarter. *Woodward Detroit CVS*, 355 NLRB 1115 (2010). Here, Sisk worked ten hours a week for about the last thirteen months prior to the election, thus comfortably satisfying the Board's standard.

*Marian Medical Center*, 339 NLRB 127 (2003); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). If the tenure is for a set, fixed duration, the employee may be ineligible as a temporary employee. Here, the record establishes that Sisk was never classified as a temporary employee – he was never informed he was temporary, and, as the record demonstrates, none of the Employer's records reflect such a classification.<sup>9</sup> Instead, Sisk was approved to work part-time first through the end of the calendar year 2020 and, when that approached, at least through the end of the fiscal year on June 30, 2021 – and even after that as the door was expressly left open to continued employment thereafter. Then, as June 30, 2021, neared, Sisk's immediate supervisor again inquired whether he was interested in staying on, indicating that was a genuine possibility. The fact that management ultimately decided to hire a replacement is beside the point as to whether the terms of his employment satisfied the strict definition of temporary status.<sup>10</sup>

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<sup>9</sup> Duke recognizes that temporary status under Board law depends, at least in part, on whether the employee has been "notified of [that status]...." Request for Review, p. 5. Here, as noted, the record is undisputed that neither the Employer's records nor any communications with Sisk "notified" him that he was a temporary employee. And the last notification he had from management before the election as to his status is inconsistent with the Employer's present argument that his tenure with Duke was finite.

<sup>10</sup> The fact that an employer may be seeking a replacement for the employee has been held by the Board to be irrelevant. *New England Lithographic Co.* 233 NLRB 1013 (1977), *enfd.* 589 F.2d 29, 34 (1st Cir. 1978). The Employer strangely challenges the Regional Director's reliance on this important decision on the ground that he cited the Court of Appeals opinion in the case. Request, p. 6. Yet, *New England Lithographic* reflects a correct statement of the Board's continued approach to temporary status, and the Court of Appeals ruling has been cited with approval in both Board decisions, *see e.g., Marian Medical Center*, 339 NLRB 127 (2003), and in the Board's official R-case manual, *An Outline of Law and Procedures in Representation Cases*, (2017). In any event, Board law is well-settled that events after the eligibility date – like Duke's decision here to hire a replacement – are wholly irrelevant to the employee's eligibility to vote. *See discussion, supra.*

In the instant case, Sisk was merely a part-time employee, and was never treated or considered as a temporary worker with a fixed length of employment. The Board has, for more than fifty years, cautioned that the question to be determined in these cases is the individual's status "*as of the eligibility payroll date.*" *Pen Mar Packaging Corp.*, 261 NLRB 874, 874 (1982), emphasis added; *New World Communications*, 328 NLRB 3 (1999); *Belcher Towing Co.*, 122 NLRB 1019, 1020 (1959).<sup>11</sup> In *Pen Mar*, the Board concluded that the employee was temporary because he was informed that he had been hired only for a fixed period with no expectation of permanent employment, and that he was a temporary as of the "*determinative August 27 eligibility date.*" *Id.*, emphasis added. Here, by comparison, the door for future employment past the June 30 end of the fiscal year was expressly left open in November 2020, and again in mid-June 2021, *weeks after the eligibility date*, when Buchanan raised the issue once again with Sisk. Either way, Sisk's employment status was still an open question on both dates given the last communication he had from his supervisor, almost six months earlier on November 12, 2020. Pet. Ex.11. Thus, as of the "determinative" eligibility date, the very last word Sisk had about his job status was one from his immediate supervisor who expressly did not establish a fixed, finite duration for his employment. She did precisely the opposite.

In light of this record and settled Board law, the Regional Director concluded that "the evidence is insufficient to show that there was a date certain for the end of Sisk's employment as of the payroll eligibility dates." Decision, p 5.<sup>12</sup> The Regional Director flatly rejected Duke's

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<sup>11</sup> As noted by the Regional Director, the "payroll eligibility date was April 30, 2021, for exempt employees and May 9, 2021, for non-exempt employees." Decision, n. 8.

<sup>12</sup> As the Board recently held, "the Board applies the 'date certain' test under which an employee will be eligible to vote if their tenure of employment is 'uncertain' on the eligibility date." *Curaleaf Massachusetts, Inc.*, 370 NLRB No.100 (2021), n.1.

argument that the Director should not rely on Buchanan's statement. The Regional Director held that it was "entirely reasonable under the circumstances" that "Sisk and his closest supervisor contemplated the continuation of his employment beyond June 30...." Decision, p. 5. The Regional Director properly held that the question of whether Buchanan technically had ultimate authority over Sisk's tenure was beside the point.

In its Request for Review, the Employer largely renews the arguments considered and rejected by the Regional Director. It urges the Regional Director to disregard the statements by Sisk's immediate supervisor of continued employment on the specious ground that other emails relating to his employment also involved higher-level officials. Yet, Amy Buchanan was Sisk's immediate supervisor and, thus, an agent of the Employer under Section 2(11) and (13) of the Act. She was on other email traffic involving Sisk, was the first named recipient of Sisk's announcement to resign in May 2020 (Er. Ex. 13), and was the management official who notified the entire staff of his departure on June 30, 2021. Er. Ex. 16. Given the complete lack of any documentation in Sisk's personnel file or in the email traffic regarding his conversion to part-time status that Sisk was ever in a temporary status, this record, as a whole, supports his eligibility to vote in the election, exactly as found by the Regional Director. Indeed, the very fact that supervisor Buchanan inquired in June, after the eligibility date had passed, whether Sisk could be kept on only underscores management's understanding that his tenure was, as of the eligibility date and thereafter, an open question.<sup>13</sup>

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<sup>13</sup> As noted, Sisk responded that he was "open" to continued employment, just as Buchanan had suggested. Tr. 265.



Under these circumstances, Sisk was, as the Regional Director properly concluded, eligible to cast his ballot in the June 29, 2021, election. His ballot, like that of Twardowski and Cornett, should be opened and counted as scheduled on January 5, 2022.

### CONCLUSION

For the foregoing reasons, we urge the Board to deny the Employer' Request for Review as there are no compelling circumstances in this case that would warrant Board review.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioner's Brief in Opposition was served this 3rd day of January 2022, by electronic mail, on counsel for the Employer, Harrison Kuntz, Ogletree, Deakins, Nash, Smoak & Steward, 7700 Bonhomme Avenue, St. Louis, MO 63105.



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